Supreme Court, U. S.
FILED
JUN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1805

JOHN W. McTIGHE - - - - - Petitioner

versus

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - - Respondents

Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents

June 21, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1805

JOHN W. McTIGHE - - - - *Petitioner*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This proceeding was initiated by a Complaint filed in the Jefferson County, Kentucky, Circuit Court by the Petitioner against the Respondents, a Delaware corporation and three individuals, nonresidents of Kentucky, asserting that the Respondents "transacted business in this Commonwealth and caused tortious injury to the plaintiff in this Commonwealth and caused injury to the plaintiff by breach of contract and warranty in this Commonwealth." By such allegations Petitioner sought to obtain jurisdiction over each of

the Respondents pursuant to the provisions of Section 454.210 of the Kentucky Revised Statutes providing for the service of process outside the Commonwealth in such instances as were alleged by the Petitioner. The Respondents denied the allegations which were intended to authorize service of process on them pursuant to the statute.

The Respondents timely presented motions to dismiss the Complaint, which motions, supported by appropriate allegations in the answers and by affidavits, were sustained by the Circuit Court.

Thereafter, the Court of Appeals of Kentucky sustained the judgment of the Circuit Court, and following that decision the Supreme Court of Kentucky denied discretionary review of the decision of the Court of Appeals. A petition for rehearing filed in the Court of Appeals was denied.

No Federal Question Was Presented Before the State Courts

The assertion is made by Petitioner (P., p. 2) that "The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3)." It may be assumed that the assertion is based upon language of that section which provides for review by the Supreme Court on petition for certiorari "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution." There is a failure on the part of Petitioner to demonstrate the basis for the assertion, and therefore a failure to comply with the provisions of Rule 40(1)(b) of the Revised Rules of the Supreme Court

of the United States. Petitioner fails to specifically state wherein his right or privilege has been denied by the state courts.

The case was before three Kentucky courts, the Circuit Court, the Court of Appeals and the Supreme Court, and each court denied the claims set forth in the Petitioner's Complaint.

The Petitioner did not present to the state courts a contention or assertion that a federal question was involved. No one of said courts passed upon or could have passed upon a federal question. Thus there is a total failure on the part of Petitioner to comply with the provisions of Rule 23-1(b), and also Rule 23-1(f), of the Revised Rules of the Supreme Court of the United States. The latter Rule provides that the Petitioner in the statement of his case shall also,

> "specify the stage in the proceedings in the court of first instance and in the appellate court, to which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * * and the way in which they were passed upon by the court."

The provisions of the foregoing rules have not been complied with. The Court will not take jurisdiction of the case sought to be presented by Petitioner. The position is announced in many cases.

In the recent case of *Cardinale* v. *Louisiana,* 394 U. S. 437, 22 L. Ed. 2d 398 (1969), the Court held that it will not decide a federal constitutional issue raised before it for the first time on review of a state court

decision, and dismissed the writ of certiorari, granted to review a state court judgment, on the ground that the federal question presented "had never been raised, preserved or passed upon in the state court below," stating:

> "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions * * *."

In the early case, *Louisville, etc. R. Co.* v. *Woodford* (Ky., 1914), 34 S. Ct. 739, 234 U. S. 46, 58 L. Ed. 1202, the Court said:

> "The decisions of this court not only have repeatedly held that a federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice."

Additionally, the Petitioner is totally unable to present his case within the character of reasons which, pursuant to Rule 19-1 of the Revised Rules of the Supreme Court of the United States, would be considered by the Court on petition for writ of certiorari.

No question is presented for review by this court.

The Issues Decided by the State Courts Present No Federal Question

The opinion of the Court of Appeals of Kentucky rendered October 25, 1978, set forth at pages 12, *et seq.*, of the Petition for Writ of Certiorari, states exactly the questions considered by the state courts, *viz.:* whether the trial court erred in finding that it did not have personal jurisdiction over the nonresident appellees and whether the doctrine of *forum non conveniens* required the trial of issues elsewhere than before the Kentucky courts. Both qustions were decided in favor of the Respondents here.

Complaint is made (P., pp. 6, *et seq.*) that the Petitioner was not given an opportunity by the trial court to take depositions in order apparently to establish that a letter referred to was libelous in nature. The statement is (P., p. 5) that the Petitioner "was not given the opportunity to prove the language" of the letter was inaccurate and therefore removed a qualified privilege. The contention is defeated by (a) the failure of the Petitioner to have applied for an opportunity to take the deposition, and (b) the action by the court in its determination that the Respondents were not before the court.

The decision of this Court in *Herbert* v. *Lando,* et al., ____ U. S. ____, 60 L. Ed. 2d 115 (1979), sought to be relied upon by the Petitioner has no application to this case. There, the Court considered the rights of the parties under the provisions of the First Amendment to the Constitution and the hearings were based

upon procedural steps to properly raise the question of the right of the plaintiff to reach certain memoranda and conversations of and among the defendants. No question arose as to the jurisdiction of the Court over the parties in that case.

The Petition for Writ of Certiorari should be denied.

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Louisville, Kentucky 40270

Counsel for the Respondents

June 21, 1979

CERTIFICATE OF SERVICE

I, Squire R. Ogden, counsel for respondents, certify that the attached Brief for Respondents in Opposition to Petition for Writ of Certiorari and Letter of Appearance were served on petitioner by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on June 21, 1979, addressed to petitioner's counsel, Arthur R. Samuel, 1506 Citizens Plaza, Louisville, Kentucky 40202.

SQUIRE R. OGDEN
OGDEN, ROBERTSON & MARSHALL
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Louisville, Ky. 40270

Counsel for Respondents

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1805

JOHN W. McTIGHE - - - - Petitioner

versus

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ARTHUR R. SAMUEL
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Louisville, Kentucky 40202
Counsel for Petitioner

May 31, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

JOHN W. MCTIGHE - - - - *Petitioner*

v.

UNIVERSITY OF AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, John W. McTighe, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky rendered on March 16, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming the dismissal of petitioner's complaint for lack of jurisdiction over the respondents, lack of jurisdiction over the subject matter, and improper venue was filed on October 20, 1978 and was not published.

The order of the Supreme Court of Kentucky denying discretionary review in the petitioner's case was entered March 13, 1979. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on March 16, 1979. Copies of the above-mentioned opinion, orders and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was rendered on August 25, 1978. Petitioner's timely petition for rehearing in the Court of Appeals of Kentucky was denied on October 20, 1978. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on March 13, 1979. The mandate of the Court of Appeals of Kentucky was issued in the petitioner's case on March 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether a "non-public figure" is entitled to the same pre-trial range of discovery in a defamation action in order to remove a qualified privilege of a defendant as a "public figure" was held to have in *Herbert* v. *Lando et al.*, —— U. S. —— (1979) since the burden of proof is identical?

2. If the answer to question one is YES, was the petitioner unconstitutionally deprived on his right to due process of law and equal protection of the law under Kentucky's long-arm statute and civil rules of discovery for being denied this range of discovery?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in the 14th Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner filed his complaint on March 29, 1977 and the Respondents filed their answer on August 18, 1977 upon agreement of an extension of time to file the answer. Petitioner then set up depositions with proper notice pursuant to CR 30 of the Kentucky Rules of Civil Procedure, however the respondents filed a motion to dismiss with the Jefferson Circuit Court and a motion to restrain the petitioner from taking depositions until the Circuit Court ruled on the motion to dismiss because of the expense in taking out of state depositions. The Circuit Court sustained the motion to restrain the petitioner from taking depositions and subsequently entered an order of dismissal on November 21, 1977. The petitioner had one deposition scheduled and arrangements were being made to take others at the time the order for dismissal was entered. Notice of appeal was filed on December 2, 1977 (Transcript of Record, hereinafter designated T.R.) (T.R., p. 90).

On August 28, 1978 the Kentucky Court of Appeals in an unpublished opinion affirmed the decision of the Circuit Court. Petitioner's timely petition for rehearing was denied by the Kentucky Court of Appeals on October 20, 1978 and petitioner's timely motion for discretionary review was denied by the Supreme Court of

Kentucky on March 13, 1979. Consequently, the Court of Appeals of Kentucky on March 16, 1979 issued the mandate in petitioner's case.

In the fall of 1972, petitioner enrolled in the graduate school at the University of Americas at Puebla, Mexico for work toward a Master of Arts Degree in Latin-American History upon the recommendation of his undergraduate advisor, Sister Rose Jean Powers, professor of history at Brescia College in Owensboro, Kentucky (T.R., p. 86).

Petitioner had completed all his course study and only needed an oral board to complete his degree requirements, however, in the Spring of 1976 he became ill with a stomach disorder and returned to Kentucky. While the petitioner was in Kentucky a dispute over policy matters occurred between the administration and faculty of the University of the Americas followed by a faculty strike which closed the University and prevented access to the campus and classrooms by the actions of the faculty and some students.

Upon the petitioner's return to the campus, he found the University in chaos and disorganization. He nevertheless met with his board professors, was given his oral boards by them, and recommended for his degree (T.R., pp. 80-82). The Administration refused to give petitioner his degree after he made every effort to obtain it while in Mexico and upon his return to Kentucky he requested Sister Rose Jean Powers to inquire into the matter for him. She wrote the respondent Fernando Macias Rendon, President of the University, and received a reply from Edward Sim-

men, Director, Division of Graduate Studies at the University and also a respondent to this action. Dr. Harold L. Kirkpatrick, respondent, is Administrative Vice-President at the University.

Respondent Simmen's reply alleged the petitioner "aligned himself with communist elements that openly tried to close this private institution and nationalize it" (T.R., p. 75); that petitioner "did a very foolish thing when he became involved in a political entanglement" (T.R., p. 75); "aims to destroy us" (T.R., p. 75); and further stated that "I, personally, would not recommend anyone of that inclination to teach in any school, or for that matter, hold any position where confidence is a requirement" (T.R., p. 75).

These letters are made a part of the appendices hereto. The petitioner in his complaint alleged that the respondent Simmen made these statements falsly and requested damages for injury to his reputation in the teaching profession. The respondent Simmen answered by alleging the statements to be privileged.

The Court of Appeals of Kentucky, at page 4 of its Opinion stated:

> "We agree that if the letter had been of a non-privilege nature if could have possibly formed the bases for a cause of action since the letter was unsealed and therefore published in the Commonwealth."

The petitioner was not given the opportunity to prove the language from Simmen was a "knowing and reckless falsehood" in order to remove the privilege.

In other words, the petitioner was thereby denied the opportunity to prove one's acts "causing tortious injury . . . in the commonwealth". KRS 454.210 (2) (a) (3).

REASON FOR GRANTING THE WRIT

The Decision Below Affirming the Trial Judge's Order of Dismissal Without Affording the Petitioner the Opportunity of Discovery in Order to Remove the Privilege From the Respondent Simmen's Communication Conflicts With Previous Decisions of the Supreme Court.

In *New York Times* v. *Sullivan,* 376 U. S. 254 (1964) "public officials" suing for defamation must prove knowing and reckless falsehood in order to establish liability. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967) extended the ruling to "public figures".

Where "non-public figures" are involved, the same proof is required in order to establish abuse of a qualified privileged, *i.e.* knowing or reckless falsehood. *Gertz* v. *Robert Welch Inc.,* 418 U. S. 323 (1974); W. Prosser, *Torts* § 115 (4th ed. 1971).

"Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages." *Herbert* v. *Lando et al.,* —— U. S. —— (1979). 50 Am. Jur. 2d § 455; 53 C.J.S. § 213.

The courts of Kentucky achieved a result against this petitioner identical to that which the defendants Lando and CBS requested, that is, "to modify firmly

established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehoods by the publisher of an alleged liable, elements that are critical to the plaintiff . . .". *Herbert* v. *Lando et al., supra.*

To accept such modification would "erect an impenetrable barrier" for a plaintiff. *New York Times* v. *Sullivan,* 376 U. S. at 286.

Mr. Justice White writing the majority opinion in *Herbert* v. *Lando et al.,* —— U. S. —— (1979) stated that "Intent, motive, and malice" were necessary to counter qualified privilege and found the same burden to exist for a plaintiff where he must "focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher."

In the case at bar as in *Herbert* v. *Lando et al., supra,* the burden to prove defamation is identical. The "non-public figure" must take on the same burden to remove the qualified privilege as the burden the "public figure" must accept to prove defamation.

The same elements (defendants state of mind and defendants doubts as to the veracity of his sources) are of "central importance". *Herbert* v. *Lando et al.,* 73 F.R.D. 387, 395, 396 (SD NY 1977).

The Kentucky courts failed to allow discovery of this nature to occur. The case was summarily dismissed before depositions could be taken, although one deposition was scheduled and others were being arranged.

Without discovery, it is impossible to draw reasonable conclusions from the evidence. Further, if more than one conclusion can be drawn, the determination of the question as to whether the priviledge has been abused is for the jury. W. Prosser, *Torts* § 115 (4th ed. 1971).

KRS 454.210 (2) (a) (3) permits personal jurisdiction over non-resident defendants who commit torts in Kentucky. The petitioner in being denied the opportunity by discovery to determine whether respondent Simmen lost his qualified privilege thereby is also denied use of KRS 454.210 (2) (a) (3) since the loss of the qualified privilege may account for tortious injury to the petitioner in Kentucky. Denial of jurisdiction in this manner deprives the petitioner of due process of law and equal treatment under the Statute as well as the civil rules of discovery.

CONCLUSION

Since the burden of proof required by the First and Fourteenth Amendments is identical for a "public figure", and a "non-public figure" removing a qualified privilege, before damages can be recovered for defamation, it is respectfully submitted that this petitioner be granted the same opportunities of discovery that Lt. Col. Herbert was granted recently by this Court.

Failure to do so deprives the petitioner of his constitutional right to due process of law in obtaining personal jurisdiction over the respondents and equal pro-

tection of law in his rights of discovery and use of the Kentucky Statute.

Respectfully submitted,

ARTHUR R. SAMUEL
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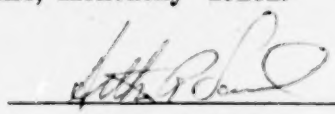
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Arthur R. Samuel, counsel for petitioner, certify that the attached Petition for Writ of Certiorari and Letter of Appearance was served on respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on May 31, 1979, addressed to respondent's counsel, Hon. Stephen F. Schuster, 1200 One Riverfront Plaza, Louisville, Kentucky 40202.



ARTHUR R. SAMUEL
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Louisville, Kentucky 40202
Counsel for Petitioner

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 231158

JOHN W. MCTIGHE - - - - - - *Plaintiff*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., et al. - - - - - - - *Defendants*

ORDER OF DISMISSAL—Entered November 21, 1977

On motion of the defendants, University of the Americas Foundation, Inc., Fernando Macias Rendon, Dr. Harold L. Kirkpatrick and Edward Simmen, and the Court having considered the arguments of counsel, and the Court being of the opinion that it does not have jurisdiction either over the subject matter or the person in this litigation and of the opinion further that the action has been brought in an improper venue, IT IS HEREBY ORDERED that the Complaint be dismissed, with prejudice, at the cost of the plaintiff.

(s) Witten
Judge, Jefferson Circuit Court

OPINION RENDERED: AUGUST 25, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 78-CA-109-MR

JOHN W. MCTIGHE - - - - - - *Appellants*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.,
FERNANDO MACIAS RENDON,
DR. HAROLD L. KIRKPATRICK,
EDWARD SIMMEN - - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Curtis G. Witten, Judge
Civil Action No. 231158

AFFIRMING

BEFORE: WILHOIT, REYNOLDS and HOWERTON, Judges.

REYNOLDS, JUDGE. This is an appeal from an order of Jefferson Circuit Court dismissing appellant's complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and improper venue.

Appellant, John W. McTighe, a Kentucky resident, enrolled in graduate school at the University of the Americas in Puebla, Mexico, in the fall of 1972 to pursue a Master of Arts degree in Latin American history. While it appears from the record that he completed the scholastic requirements for a Master's degree in 1976, the University declined to award him a degree. Apparently, the basis for this re-

fusal was appellant's alleged participation in a teachers' strike at the University, which caused disruption for a time and eventually led to the closing of the school's liberal arts department and the firing of many employees and professors. One of appellant's undergraduate professors at Brescia College, Sister Rose Jean Powers, at appellant's request, wrote the University requesting both an explanation for the school's failure to award the degree and any reasons which might be known why she should not recommend him for a job in the secondary teaching field. Edward Simmen, Director of Graduate Studies at the school, responded, in part, to the inquiries as follows:

> Perhaps, I better than anyone, now know more of what happened during the crisis which we had here. A nucleus of employees and students aligned themselves with Communist elements that openly tried to close this private institution and nationalize it. I have been for the last six months conducting research in order to write the official history of the occupation that nearly destroyed this University.
>
> Mr. McTighe, as a foreigner in this country, did a very foolish thing when he became involved in a political entanglement. I, myself, would not recommend anyone who was involved in the attempt to overthrow the school and turn it over to elements which would alter it for political reasons. And I will not permit Mr. McTighe to hide behind a veil of innocence. From my research, I now know that the aims to destroy us were common knowledge. I, personally, would not recommend anyone of that inclination to teach in any school or, for that matter, hold any position where confidence is a requirement.

After several months of unsuccessfully attempting to obtain his degree, appellant filed suit against the University

of the Americas Foundation, Inc., a Delaware corporation, Fernanda Macias Renden, Rector of the University, Dr. Harold L. Kirkpatrick, Vice-Rector, and Edward Simmen, Director of Graduate Studies. The individual appellees are residents of Mexico.

Appellant raises two issues: whether the circuit court erred in finding that it did not have personal jurisdiction over the non-resident appellees, thereby dismissing appellant's complaint; and whether Kentucky is the proper and convenient forum.

Appellant maintains that personal jurisdiction is proper on any of three grounds included in K.R.S. 454.210:

(1) Transacting business within the state. K.R.S. 454.210(2)(a)(1);

(2) The commission of a tortious act within the state, K.R.S. 454.210(2)(a)(3); and

(3) Breach of an express or implied warranty, K.R.S. 454.210(2)(a)(5).

The contention that the University and its agents breached an expressed or implied warranty under KRS 454.210-(2)(a)(5) is without merit. The statute provides that the breach must occur in the sale of *goods outside* the Commonwealth or *services rendered* in the Commonwealth. We find all services were rendered in Mexico.

As to the argument that appellant transacted business in the Commonwealth within the purview of K.R.S. 454.210(2)(a)(1), the evidence presented by appellant was that he had received numerous correspondence from the University of the Americas, had sent tuition fees upon request to the University by checks drawn on Kentucky banks, and had studied literature in libraries sent into Kentucky by the University. Given these limited contracts, personal jurisdiction cannot be obtained. In *Davis H. Elliot* v.

Caribbean Utilities Company, Ltd., 513 F. 2d 1176 (6th Cir. 1975), the Sixth Circuit Court of Appeals held that the limits of personal jurisdiction conferred by K.R.S. 454.210-(2)(a)(1) are coextensive with the boundaries of the due process clause. The opinion, based on the minimum contacts concepts of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), as applied in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957), and *Hanson* v. *Denckla*, 357 U. S. 235 (1958), set forth a three-point test for determining the constitutional outer limits of personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Elliot, supra*, at p. 1181.

Under this test it would be improper to base jurisdiction over the University or its agents upon K.R.S. 454.210-(2)(a)(1). Further, appellant's action for breach of warranty, based upon the failure to award a degree in Mexico, cannot properly be brought under K.R.S. 454.210(2)(a)(1) since the cause of action did not arise from any transaction of business within this state. K.R.S. 454.210(2)(b).

Appellant's contention that personal jurisdiction can be obtained pursuant to K.R.S. 454.210(2)(a)(3) is likewise without merit. Jursidiction under this subsection is obtained when there is a tortious injury by an act or omission in this Commonwealth. We agree that if the letter had been of a nonprivileged nature it could have possibly formed the basis for a cause of action since the letter was

unsealed and therefore published in this Commonwealth. *Fordson Coal Co.* v. *Carter,* 269 Ky. 805, 108 S. W. 2d 1007 (1937). However, a motion to dismiss was filed pursuant to CR 12.02 and asserted that the pleadings failed to state a claim upon which relief could be granted. That rule provides that the motion "shall be treated as one for summary judgment and disposed of as provided for in Rule 56." The trial court considered the letter written by Sister Powers, requested by appellant, as well as the response elicited from Simmen, and it was proper for the court to determine that the correspondence was qualifiedly privileged so as to defeat jurisdiction pursuant to K.R.S. 454.210(2)(a)(3). We note that while carbon copies of the letter were mailed, none would have been mailed in this Commonwealth that were not qualifiedly privileged. Since there was but one limited publication in this state, and this was an answer fairly made by a person in the dicharge of a duty in the conduct of his own affairs and about matters where his interest was concerned, whether the letter was privileged is clearly to be determined by the court as an issue of law. W. Prosser, *Torts* § 115 (4th ed. 1971). The general rule is that a publication procured or invited by the plaintiff or his authorized agent is privileged. This is particularly true where the answer of the defendant does not go beyond the plaintiff's questions. 53 C.J.S. *Libel & Slander* § 95. Further, the person inquired of on a privileged occasion must be fair to the person making the inquiry, and if he has information, regardless of whether he has investigated it or not, the statement that the information has come to him, honestly made, is privileged. 53 C.J.S. *Libel & Slander* § 93. Here there was no allegation, until this appeal, that the letter was not written in good faith or with actual malice. Under the circumstances of this particular case, we feel the communication was privileged. *Bushett* v. *Crossfield,* 190 Ky. 751, 228 S. W. 673

(1921). Therefore, there was no tortious injury within this state, and jurisdiction could not be based on K.R.S. 454.210-(2)(a)(3).

Even if jurisdiction could have been obtained over the persons of the defendants, the doctrine of forum non conveniens is a proper basis for the lower court's decision. When a court believes that the action before it may be more appropriately and justly tried elsewhere, it may decline to exercise jurisdiction over a transitory cause of action. The primary factors governing such a decision are set out in *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947), which was cited to this court by both parties in support of their positions. The problems of which appellant complains occurred in Mexico. The individual appellees reside there, and all of the witnesses, other than Sister Powers, either reside there or were members of the faculty or were students there. Appellant chose to be a student there and should not now complain of the inconveniences of having to litigate his problems there. In this case there is an alternative forum available to appellant in which he may litigate his claim. See *Carter* v. *Netherton,* Ky., 302 S. W. 2d 382 (1957).

The judgment is affirmed.

ALL CONRUR.

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Attorneys for Appellees:

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COURT OF APPEALS OF KENTUCKY

78-CA-109-MR

JOHN W. McTIGHE - - - - - - *Appellant*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.,
FERNANDO MACIAS RENDON,
DR. HAROLD L. KIRKPATRICK,
EDWARD SIMMEN - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Curtis G. Witten, Judge
Civil Action No. 231158

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, REYNOLDS, and WILHOIT, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

(s) J. William Howerton
Judge, Court of Appeals

Entered: October 20, 1978

[LETTERHEAD OF CLERK OF COURT OF APPEALS]

CERTIFICATION

I, John C. Scott, Clerk, do hereby certify that the foregoing ORDER OF DISMISSAL of the Jefferson Circuit Court entered November 21, 1977; AFFIRMING opinion rendered August 25, 1978; ORDER DENYING PETITION FOR REHEARING entered October 20, 1978 in the case of John W. McTighe Vs. University of the Americas Foundation, Inc.; Fernando Macias Rendon, Dr. Harold L. Kirkpatrick, Edward Simmen (file no. 78-CA-109-MR) is a true and correct copy as same appears in my office.

Done this 7 day of November, 1978 at Frankfort, Kentucky.

John C. Scott, Clerk
By: (s) Shelley L. Ellis, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY

78-SC-598-D
(78-CA-109-MR)

JOHN W. McTIGHE - - - - - - - - *Movant*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., ET AL. - - - - - - - - - *Respondents*

Jefferson Circuit Court
#231158

ORDER DENYING DISCRETIONARY REVIEW

The motion of John W. McTighe for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

Entered March 13, 1979.

(s) John S. Palmore
Chief Justice

[LETTERHEAD OF CLERK OF SUPREME COURT OF KENTUCKY]

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order Denying Discretionary Review, Entered March 13, 1979, in the matter of John W. McTighe vs. University of the Americas Foundation, Inc., et al., File No. 78-SC-598-D (Court of Appeals File No. 78-CA-109-MR), (Jefferson Circuit Court #231158), is a true and correct copy of the original order as it appears on file in my office.

Done this 22nd day of May, 1979, at Frankfort, Kentucky.

Martha Layne Collins, Clerk
By (s) Betty Whitton
Chief Deputy Clerk

(Seal)

OPINION RENDERED: AUGUST 25, 1978

COURT OF APPEALS OF KENTUCKY

File No. 78-CA-109-MR

JOHN W. McTIGHE

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., ET AL.

File No. 78-CA-109-MR

Appeal from Jeffersn Circuit Court
Action No. 231158

MANDATE

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

OCTOBER 20, 1978—Appellant's Petition for Rehearing Denied.

MARCH 13, 1979—Movant's Motion for Discretionary Review Denied by Supreme Court.

A Copy—Attest:

(s) John S. Scott
Clerk

Issued March 16, 1979

[LETTERHEAD OF BRESCIA COLLEGE]
April 13, 1977

Senor Fernando Macias Rendon, President
Universidad de las Americas
Apartado Postal 507
Puebla, Pues. Mexico

Dear Sir:

I am writing this letter of inquiry in an attempt to understand what has been happening at the University of the Americas.

In 1972 I wrote recommendations for two of our own graduates who planned to major in Latin American Studies in the University of the Americas Graduate School. Both, Paul Rogier and John McTighe, intended to work for the Master of Arts degree.

Having waited over a full year after completing his degree requirements at your University, Paul Rogier finally received his degree this March; which, I might add, was awarded *cum laude*. Waiting a year for his degree was frustrating enough for Paul; but John's experience at the University of the Americas sounds almost unbelievable.

John returned from the University in the spring of 1976. According to the account he related to various faculty members and students here he was expelled from the University of the Americas because he participated in a strike at the University. He said that the strike included members of the faculty, the student body and a union known as the Union of Workers and Employees of the University of the Americas. He also said that the striking faculty were fired, that students were expelled, and that some students who had finished all degree requirements were refused their degrees. He maintained that his own transcripts were being held and possibly altered and that now he has no hope of completing his degree.

I fully realize, Sir, that John may be giving only a student's view of the proceedings at the University so I would very much appreciate knowing from someone in authority what the situation was and is. Also John is currently asking for my recommendation to help him secure a job in the secondary teaching field. If you are aware of any reason why I should not grant such a recommendation I would appreciate knowing such.

A speedy response from you in this matter would be greatly appreciated.

Sincerely,

(s) Sister Rose Jean Powers
Instructor in History

[LETTERHEAD OF UNIVERSIDAD DE LAS AMERICAS]

May 9, 1977

Sister Rose Jean Powers
Instructor of History
Brescia College
Owensboro, Kentucky 42301
U.S.A.

Dear Sister Rose Jean,

Thank you very much for your letter of 13 April 1977 in which you speak in behalf of John McTighe's request for a transcript. Let me begin by saying the Mr. McTighe was sent a transcript on 19 April, accompanied by a letter from the Assistant to the Registrar. May I say also that this office has never received a request for a transcript either. I wish that Mr. McTighe would write to me stating exactly to whom he sent the letters requesting a transcript. It all seems very strange.

And one other statement that you make causes me great concern. You say that he maintains that his transcripts

were "possibly altered and that now he has no hope of completing his degree". I assume that you have contact with Mr. McTighe. If you do, please tell him to give me any information regarding this possibility. It simply is not true that anything of that nature could have or would have happened. It is unfortunate but it is a fact: former professors and students have been misrepresenting the University. May I be blunt? These former professors and students have lied about the University.

Perhaps, I better than anyone, now know more of what happened during the crisis which we had here. A nucleus of employees and students aligned themselves with communist elements that openly tried to close this private institution and nationalize it. I have been for the last six months conducting research in order to write the official history of the occupation that nearly destroyed this university.

Mr. McTighe, as a foreigner in this country, did a very foolish thing when he became involved in a political entanglement. I, myself, would not recommend anyone who was involved in the attempt to overthrow this school and turn it over to elements which would alter it for political reasons. And I will not permit Mr. McTighe to hide behind a veil of innocence. From my research, I know now that the aims to destroy us were common knowledge. I, personally, would not recommend anyone of that inclination to teach in any school or, for that matter, hold any position where confidence is a requirement.

Sister, you may do as you wish. But I am giving you the facts. If you wish to confirm them, I request that you write to Dr. Gordon Sweet, Executive Secretary of the Commission of Colleges of the Southern Association of Colleges and Schools. (Is that the same agency that accredits Brescia College?) He will, I am certain, be most helpful in confirming what I have written to you.

I am sorry to have been so blunt in my response to you. But I have been silent for a long time. Never once did we take the offensive during the takeover. I said very little when I was thrown out of my home, which is located on the campus, by Mr. McTighe's compatriots. My colleagues nd I simply moved to apartments and hotels in order to avoid any kind of incident which might have been deadly. If you know Latin America, you will know that such a happening is most possible. Never once did those loyal to the University attempt to strike back, even when slanderous documents were published and distributed throughout the city or when threatening slogans were painted on the walls of the city.

No. We moved into buildings in Puebla and continued to teach our classes. You must remember that Mr. McTighe and his group closed this university to our students. For five months, because they wanted to destroy us, they deprived students who wanted to learn the use of the library, the laboratories, and the classrooms. This is what they did.

Let me try to make one more point very clear. We have tried our very best to live up to the agreement that was signed to end the crisis. Accordingly, we have graduated persons who were directly involved in the attempt to destroy the school, including two wives who actively participated with their professor husbands. And other students are according to the agreement: Anyone who needs 15 credits or less to be graduated has the right to transfer those credits from an approved institution and receive his degree from the University. Let me repeat. All is being done according to the agreement that was signed.

Finally, Mr. McTigue recently contacted his congressman, the Honorable *Romano L. Mazzoli M.C.* and told him what, I suppose, he told you. In an attempt to clarify the University's position, the President of the University, Ing.

Fernando Macias Rendon, and the Vice-President for Administrative Affairs, Dr. Harold L. Kirkpatrick, made a visit to Congressman *Mazzoli's* offices in Washington and spent some time visiting with his staff. The Congressman has now been given the entire story.

Sister, I have taken a great deal of your time explaining this matter and to answer your most understanding letter. I hope that you can see why. It is most important for us that you realize what we are doing for our students. During the occupation of the campus, an editorial was published in the nation's largest newspaper, *Excelsior* that denounced the closing of any university by strikes called by selfish and self-serving interests. It said, in effect, that every day a university in Mexico is closed, the nation takes a step backward because that day can never be recaptured.

Your ex-student may have been a Latin American Studies major, but he seems to have very little positive interest in Mexico.

Foreign students such as Mr. McTighe whatever their potential, we do not want.

Yours most sincerely,

(s) Edward Simmen, Director
Division of Graduate Studies

c.c. Ing. Fernando Macias Rendon, Rector
Dr. Harold L. Kirkpatrick, Administrative
Vice-President
Dr. Gordon Sweet
Southern Association of Colleges and Schools
795 Peachtree Street. N.E.
Atlanta, Georgia. 30308
The Honorable Romano L. Mazzoli
The United States of America
Washington, D. C.

ES/grl.

MISCELLANEOUS PRACTICE PROVISIONS

454.210. Personal jurisdiction of courts over nonresidents—Process, how served—Venue.—(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this commonwealth.

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this commonwealth;

2. Contracting to supply services or goods in this commonwealth;

3. Causing tortious injury by an act or omission in this commonwealth;